STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT TRAVOIS DAWSON,

Defendant-Appellant.

UNPUBLISHED
February 25, 1997

No. 181467
Calhoun Circuit Court
LC No. 94-001536-FC

Before: Gribbs, P.J., and Markey and T.G. Kavanagh,* JJ.

PER CURIAM.

After the death of a seventeen-year-old boy, defendant was charged with first-degree murder, MCL 750.316; MSA 28.548, use of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon, MCL 750.227; MSA 28.424. A jury found defendant guilty of first-degree murder and felony-firearm. The trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction and two years' consecutive imprisonment for the felony-firearm conviction. Defendant appeals as of right from his convictions and sentences. We affirm.

Defendant asserts that the trial court erred in denying his motion for a new trial based upon the prosecution's failure to inform defendant that one of the prosecution's witnesses, Tremaine Watson, had felonious assault charges pending against him in the same county when he testified at defendant's trial. Defendant contends that this omission precluded him from cross-examining this witness to establish the witness's bias, interest, and motive in testifying, i.e., to receive favorable treatment from the prosecution with respect to the other pending charge. We review the trial court's denial of defendant's motion for new trial for a clear abuse of discretion, i.e., whether an unbiased person reviewing the evidence would conclude that no justification or excuse existed for the trial court's ruling. *People v Herbert (On Reconsideration)*, 444 Mich 466, 477; 511 NW2d 654 (1993); see *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). We find no abuse of discretion.

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

In *People v Yarbrough*, 183 Mich App 163, 164-165; 454 NW2d 419 (1990), this Court stated:

> [T]he general rule more appropriately stated is that evidence of arrests not resulting in convictions is inadmissible to impeach the credibility of a witness. Nonetheless, we believe that an exception to that rule exists where, as here, the evidence is being offered to show the witness's interest in the matter, his bias or prejudice, or his motive to testify falsely because that witness has charges pending against him which arose out of the same incident for which defendant is on trial.

In denying defendant's motion, the trial court reviewed this Court's opinion in *People v Torrez*, 90 Mich App 120, 124-125; 282 NW2d 252 (1979), where we held that the prosecutor's failure to disclose pending perjury charges against the key witness, which charges "certainly related to the trustworthiness of [the informant-witness's] testimony," required that defendant receive a new trial. This Court in *Torrez, supra* at 123, adopted the rule set forth in *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), that a defendant's due process rights are violated if the prosecution suppresses evidence favorable to an accused if the evidence is "material either to guilt or to punishment" and the defendant makes a request for the information. The trial court in the case at bar applied the three *Brady* factors: (1) the prosecution's suppression of the evidence after a defense request; (2) the favorable character of the evidence; and (3) the materiality of the evidence. *People v Browning*, 104 Mich App 741, 768-769; 306 NW2d 326 (1981). We believe that the evidence of Watson's felonious assault charge, unlike the perjury charge against the key informant-witness in *Torrez, supra*, was not material.

Unlike the testimony of the key informant-witness who carried out the drug deal, Watson's testimony was not material to defendant's guilt. Rather, Watson testified along with several other corroborating eye witnesses in support of the victim's statement that defendant shot him. An abundance of physical evidence existed to contradict defendant's claim of self-defense. Further, the fact that Kara Johnson, the victim's cousin, and Watson testified in a similar fashion with respect to the events they witnessed while sitting in Johnson's car during the shooting weakens defendant's assertion that Watson altered his testimony or that Watson, but not Johnson, was a key witness. Finally, this is not an instance where Watson was part of the crime and could have received leniency with respect to another crime in exchange for his participation in the crime and testimony at trial, as in *Torrez, supra*. Thus, we find no abuse of discretion in the trial court's finding that Watson was not a key witness and that the fact that Watson could have lied on the stand was too attenuated for purposes of finding that the evidence was favorable to defendant or material to defendant's guilt.

Even assuming that the trial court erred in finding no *Brady* violation, we find that the error was harmless. *People v Mack*, 218 Mich App 359, 364-365; 554 NW2d 324 (1996).[1] A harmless-error analysis is a two-step process when constitutional issues such as due process and the right to cross-examination are involved. *Id.* at 364. First, we must determine whether the error is harmless beyond a reasonable doubt, i.e., whether the error had no effect on the verdict. Second, we must determine whether the error was so offensive to the maintenance of a sound judicial system that it can never be

regarded as harmless, i.e., the error was deliberately injected by the prosecutor, it deprived defendant of a fundamental element of the adversarial process, or if it was particularly persuasive or inflammatory. *Id.*. citing *People v Minor*, 213 Mich App 682, 685-686; 541 NW2d 576 (1995).

Here, we conclude that the evidence supporting defendant's convictions was overwhelming. *Mack*, *supra*. Several witnesses and the victim identified defendant as the attacker, and defendant admitted to the police that he shot the victim in self-defense. The prosecution also submitted uncontroverted physical evidence to rebut defendant's self-defense theory. "Accordingly, any error that restricted defendant's ability to impeach the witness[] could not have affected the verdict, and thus was harmless beyond a reasonable doubt." *Id.* Also, although the prosecutor failed to inform defendant of the pending charges against Watson, the omission was not intentional in light of defendant's request for "[a]ny and all copies of the Criminal History and/or convictions of the witnesses who will be called to testify at trial" (emphasis added). "Further, the error cannot be said to have been particularly persuasive or inflammatory because, as noted, the evidence against defendant was great, and the error resulted in subtraction of testimony rather than its addition." *Id.* at 365. Accordingly, the error was harmless and reversal is not required.

With respect to defendant's myriad claims of prosecutorial misconduct, we find that defendant failed to object to almost all of the asserted misconduct. Because defense counsel failed to object to certain alleged improprieties, we will not review these issues on appeal absent a miscarriage of justice, which will not be found because the prejudicial effect of the prosecutor's comments could have been countered by a timely curative instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Rivera*, 216 Mich App 648; 651-652; 550 NW2d 593 (1996).

With respect to the properly preserved allegations of misconduct or the improper introduction of evidence, we find no error. Defendant objected to the prosecutor's statements that could lead the jury to believe that he had to call all res gestae witnesses, thereby positioning itself as the "champion of truth," and to the prosecutor's failure to call as res gestae witnesses the individuals that the police witness mentioned during direct examination. With respect to the first claimed error, we find no miscarriage of justice that denied defendant a fair trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). The prosecutor's remarks that he has to take his witnesses as he finds them, with their faults, did not violate MCL 767.40a; MSA 28.980(1) or the prosecutor's responsibility to exercise due diligence in identifying, locating and producing res gestae witnesses. *People v DeMeyers*, 183 Mich App 286, 291; 454 NW2d 202 (1990). Rather, the comment was made in response to defendant's attack on witness Tommy Upton's credibility in light of Upton's criminal record. With respect to the second claimed error, defendant waived the issue by not moving for a new trial on the basis that the prosecution's failure to produce these witnesses resulted in prejudice to defendant. *People v Jackson*, 178 Mich App 62, 66; 443 NW2d 423 (1989).

Regarding the admission of evidence regarding the kind of neighborhood in which the shooting took place, we find that the trial court did not abuse its discretion in admitting the officer's testimony that the neighborhood was predominantly minority and known for substantial drug activity and "felony-firearms." *McAlister*, *supra* at 505. Defendant merely contends this information was irrelevant and

improperly implied the existence of a gangland killing, despite the stipulation that the parties entered regarding the frequency of weapons being fired in that area and defendant's admission to Detective Adams that the victim was a gang member.

Finally, in the absence of any cumulative error, defendant's claim that the prosecutor's misconduct was pervasive and intentional cannot prevail.

Affirmed.

/s/ Roman S. Gribbs
/s/ Jane E. Markey

Justice Thomas G. Kavanagh did not participate.

[1] In *Mack*, *supra*, this Court found that the trial court erred in failing to allow defendant access to the criminal histories of the prosecution's witnesses available through the Law Enforcement Information Network (LEIN), but found the error to be harmless.